Appellate Case No. 56441-6-II

Pierce County Superior Court Case No. 2-2-04347-3

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON AT TACOMA

Herbert L. Whitehead, III, Jennifer L. Whitehead, Southwest Enterprises, LLC, Mt. View Enterprise, LLC, Whitehead Consulting, LLC and Whitehead Enterprises, LLC,

Petitioner,

v.

Kenneth Wren and Alice Wren, *et al.*,

Respondents.

ANSWERING BRIEF OF RESPONDENT

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Appellants Herbert Whitehead, Whitehead Enterprises, LLC, *et al.* ("Whitehead") ask this Court to "completely overturn the order on summary judgment." The Superior Court's order includes a dismissal of Whitehead's counterclaim #1, which the Superior Court described as a claim "which alleges that Stanford and Sons actually owes them $160,000 under the 2010 LOC." To the extent that Whitehead may intend to appeal as against Defendant Stanford and Sons, LLC ("Stanford"), Stanford now appears and responds as follows.

To begin with, Whitehead's counterclaim was against Plaintiffs-Respondents Kevin and Alice Wren ("Wren"), not against Stanford. *See* Defendants' Answer, Affirmative hDefenses, Counterclaims, Cross-Claims, and Third Party Claims, p. 33. The Superior Court, despite the somewhat confusing phrasing of its summary judgment order, expressly dismissed a "counterclaim," not a cross-claim. CP 1073. That is because Whitehead alleged that Stanford owed Whitehead Enterprises LLC $160,000 for "credit payments" made by

Whitehead under the 2010 LOC, and further alleged that the 2010 LOC was assigned by Stanford to Wren; therefore, Whitehead framed the claim as being against Wren, not against Stanford. *See* Defendants' Answer, Affirmative Defenses, Counterclaims, Cross-Claims, and Third Party Claims, p. 33.

Therefore, to whatever extent Whitehead asks this Court for relief as against Stanford, this Court cannot grant it.

Moreover, the Superior Court was entirely correct to grant summary judgment dismissing Whitehead's counterclaim. For all of Whitehead's contentions, this matter comes down to a relatively simple set of facts. Whitehead executed a Line of Credit and Promissory Note, was advanced funds under the same, and then failed to repay the loan when it was due. Those were the facts before the trial court when it properly held Whitehead liable for amount owed under the loan agreement he executed. Whitehead's appeal is not based on any genuine issues of material fact or law, but on irrelevant issues or issues improperly raised for the first time on appeal.

Whitehead states in his Response to the Summary Judgement Motion that "Whitehead does not dispute the existence of the 2010 LOC" and further acknowledges it in their Opening Brief. Whitehead Reply, Opening Brief 7. There is therefore no genuine issue of material fact regarding the existence of the 2010 LOC. Whitehead admits that he executed an agreement obligating him to repay monies advanced to him as loans and has not provided any evidence to the contrary.

Whitehead repeatedly and consistently endorsed and deposited checks with the "memo" section clearly stating "loan". Whitehead does not deny doing this. There is no genuine issue of material fact as to whether checks indicating they were loans were deposited by Whitehead. There is therefore an undisputed agreement to lend money followed by checks indicating that they were loans.

As Whitehead provide no evidence or argument in opposition to those two key facts, the trial court properly found that there was no genuine issue of material fact regarding this

loan. The remainder of Whitehead's arguments are either irrelevant or precluded from review.

Whitehead makes repeated reference to Brautigan's testimony, but Brautigan's testimony is not needed to establish the existence of these loans. The documents speak for themselves. Under Washington law, it is the objective manifestation of the parties, i.e., their written contract, that determines the intent of the parties. "Thus, when interpreting contracts**,** the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used." *Hearst Communications, Inc. v. Seattle Times Co*., 154 Wn. 2d 493 (2005). As Brautigan's testimony could only be used to infer the party's subjective intent it is not relevant, and he is not a material witness. Further, the Promissory Note clearly states that "No prior agreement, statement, or promise written or oral made by any party for this Note that is not contained herein shall be binding and valid".

Whitehead contends that he would not have worked for free, but as evidenced by his conduct, Whitehead did agree to this arrangement. He signed the 2010 LOC and accepted the loan checks. He did not report these payments on his taxes as income and did not receive a W-2. His subjective motivation for doing so is irrelevant. when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used. *Hearst* at 504. However, as Whitehead states in his Opening Brief, "Whitehead was financially invested in seeing the company succeed". He had invested both money and property into the business and in his 9/20/21 Declaration Whitehead states that profits would be distributed equally to him. CP 685. Brautigan confirmed this in his deposition (p. 269) stating that the plan was for Whitehead to become an owner. It is not inconceivable that someone would work without compensation to build a business when they expected a future ownership interest.

Whitehead, for the first time, raises the issue of Nicola Bley Asquith's credibility and alleged bias. If Whitehead had concerns about the veracity of Ms. Asquith's testimony he should have raised it before the trial court. Failure to do so generally precludes a party from raising it on appeal. *Smith v. Shannon*, 100 Wn. .2d 26, 37, 666 P.2d 351 (1983); RAP 2.5(a). Even if he were to have raised it, he has provided no contrary testimony, and has only made unsupported allegations that she is "a staunch opponent of Whitehead".

Whitehead contends that Ms. Asquith's report is flawed because she lacked the means to determine what payments were against the $160,000 loan by Whitehead as opposed to the 2010 LOC. Even if Whitehead were correct here, the effect is immaterial, and to Whitehead's benefit. Categorizing these payments as toward the loan by Whitehead reduces the potential amount that could be claimed to be under the 2010 LOC. Whitehead also failed to offer any evidence to the

contrary in the Summary Judgement proceedings and has not done so here.

Further, his brief makes no specific allegations that she erred in her accounting of the 2010 LOC. The fact that Ms. Asquith was not involved in the day-to-day operations of Stanford and Sons has no bearing on her ability to add up the loan checks. Whitehead has not identified a single check that was included that did not indicate it was a loan.

In fact, Whitehead suggests that it is a problem for Wren that the payments from March 2016 to July 2019 were not considered as loans. As Whitehead acknowledges, those checks did not have "loan" written on them. Whitehead attempts to minimize this by stating that it was "the only thing that changed" but the lack of a notation indicating a payment is a loan is hardly insignificant.

Whitehead finally raises the issue of the default interest rate. However, he failed to do so in his reply to Wren's Summary Judgement Motion. If Whitehead objected to the

interest rate in the 2010 LOC he should have raised it before the trial court. He should not be allowed to do so now. Smith

Whitehead's appeal is not based on genuine questions of law or fact, but on unfounded allegations and irrelevant testimony. The evidence before the trial court clearly showed that Whitehead executed the 2010 LOC, received loaned funds, and then failed to pay it back as required. The trial court properly ignored Whitehead's irrelevant issues and ruled on the evidence before the court. Its ruling should be upheld.

For the reasons set forth above, this Court should dismiss the appeal or affirm the decision of the Superior Court.

I hereby certify that this brief contains 1,246 words, in compliance with RAP 18.17.

DATED this 21st day of June, 2022.

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PROOF OF SERVICE

The undersigned declares under penalty of perjury that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the above-entitled action. On June 21, 2022, I served or caused to be served a copy of the foregoing document upon all counsel of record signed via e-service on:

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